



UNITED STATES DEPARTMENT OF COMMERCE
The Under Secretary of Commerce
for Oceans and Atmosphere
Washington, D.C. 20230

CERTIFIED MAIL

DEC 23 2003

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Re: Barnes Nursery, Inc.
CZMA Consistency Appeal

Dear Mr. Bell and Mr. Petro:

By letter dated July 10, 2001, Barnes Nursery, Inc., filed a notice of appeal with the Secretary of Commerce (Secretary) pursuant to section 307(c)(3)(A) of the Coastal Zone Management Act (CZMA), as amended, 16 U.S.C. 1451 et seq., and the Department of Commerce's implementing regulations, 15 C.F.R. Part 930, subpart H. The appeal is taken from an objection by the State of Ohio to Barnes' consistency certification for an after-the-fact permit from the U.S. Army Corps of Engineers (Corps) pursuant to section 404 of the Clean Water Act, to construct a hydrologic channel adjacent to East Sandusky Bay, Ohio for the purpose of providing irrigation water to nursery stock. This letter dismisses the Federal consistency appeal of Barnes Nursery, Inc., for the reasons set forth below. Pursuant to section 307(c)(3)(A), the Corps may not grant an after-the-fact permit to Barnes Nursery, Inc.

Description of the Barnes Nursery, Inc., Project

On June 19, 2000, Robert W. Barnes acting as authorized agent for an entity characterized as "C.C.C.M.B.," formed by property owners adjacent to or near the Barnes Nursery, Inc., filed an application with the Corps for a Nationwide Permit 27 to construct a 3,000 foot channel, 20 feet wide and 10 feet deep, and earthen berm, 44 feet wide and 4 feet high, for the purpose of "creating deep water habitat and nesting islands for waterfowl" adjacent to the Sheldon Marsh



Nature Preserve which is owned by the State of Ohio and managed by the Ohio Department of Natural Resources (ODNR). Exhibit F, Ohio Initial Brief. On June 20, 2000, the Corps authorized the activities of C.C.C.M.B. pursuant to 33 C.F.R. 330.6 (Nationwide Permit 27), and Barnes began construction shortly thereafter. Ohio Initial Brief at 5, and Exhibit J. On July 21, 2000, ODNR and Ohio Environmental Protection Agency (OEPA) filed letters with the Corps stating that the Corps lacked authority to issue the permit because the project's temporary and permanent impacts to category 3 wetlands were not certified by the State of Ohio pursuant to the Corps' regulations, requesting that the Corps revoke the Nationwide Permit to C.C.C.M.B. and that the Corps issue a stop work order. Ohio Initial Brief, Exhibit L and Exhibit A. Subsequently, the United States Fish and Wildlife Service (USFWS) and United States Environmental Protection Agency (USEPA) filed letters with the Corps in support of ODNR's requests. Ohio Initial Brief, Exhibits C and D.

At the time work was stopped on July 21, 2000, C.C.C.M.B.'s project was 1,500 feet long, 50 feet wide and 5 feet deep. Environmental Assessment and Statement of Findings, Corps Application No. 2000-02170, November 29, 2001, Ohio Initial Brief, Exhibit M. On January 8, 2001, the Corps notified Robert Barnes in his capacity as agent for C.C.C.M.B. that the project was deemed an unpermitted activity and that it must apply for an after-the-fact individual permit. Letter dated January 8, 2001, from the Corps' District Engineer to Robert Barnes, Ohio Initial Brief, Exhibit N. C.C.C.M.B. was further warned that if it failed to apply for an after-the-fact permit, it must restore the entire site to preconstruction condition. *Id.*

Permit Application, Objection and Appeal

On March 13, 2001, Barnes Nursery, Inc., no longer acting as a partner in the C.C.C.M.B. entity, applied for an Individual Permit pursuant to section 404 of the Clean Water Act for its project entitled "East Sandusky Bay Hydrology Restoration Project." Letter dated March 13, 2001, from Robert Barnes, Barnes Nursery, Inc., to Michael Martone, Regulatory Branch, Corps, Ohio Initial Brief, Exhibit O. The application for an individual permit sought authorization to maintain the channel and berm already constructed. In addition, Barnes Nursery, Inc., (hereafter referred to as Barnes or Appellant) sought modifications for a side channel 500 feet long and 1.5 feet deep. Permit Application 2000-02170, Ohio Initial Brief, Exhibit P, 2. Barnes' application for the individual permit described the purpose of its activity as "providing a supply of irrigation water for nursery stock." *Id.*

On June 11, 2001, Ohio issued its Objection to Barnes' individual permit application in conformance with the Department of Commerce Federal consistency regulations at 15 C.F.R. Part 930 Subpart D. Letter dated June 11, 2001, from Wayne R. Warren, ODNR, to Robert Barnes, Barnes Nursery, Inc. Ohio Initial Brief, Exhibit B. On July 10, 2001, Barnes, acting by and through its Counsel, Steven D. Bell, Ulmer and Berne LLP, filed its Notice of Appeal and fees with the Secretary. Notice of Appeal, dated July 10, 2001. On August 6, 2001, an initial

briefing schedule was issued.¹ To ensure the parties were fully informed of the CZMA standard of review for federal consistency appeals, the letter set out verbatim the Department of Commerce regulations implementing the standard of review for CZMA federal consistency appeals. Letter dated August 6, 2001, from Assistant General Counsel for Ocean Services to Counsel for Barnes and Ohio. The parties promptly filed a request for a stay of the appeal pursuant to 15 C.F.R. 930.129(c)(2). Joint Request, dated September 10, 2001, from Cynthia K. Frazzini, Assistant Attorney General, and Steven D. Bell, Counsel for Appellant. The Appellant and the State jointly requested two additional stays. Barnes' Initial Brief was ultimately due on May 8, 2002. Joint Requests dated November 20, 2001, and February 21, 2002, respectively, and letters dated March 4, 2002, from the Assistant General Counsel for Ocean Services to Cynthia K. Frazzini, Assistant Attorney General, State of Ohio, and Steven D. Bell, Counsel for Appellant.

On May 3, 2002, Barnes requested the Secretary grant it a fourth stay and remand the matter to the State for consideration of new information unavailable at the time of the State's consistency objection pursuant to 15 C.F.R. 930.129(c)(3) and (d). Barnes failed to accompany its request with materials required by 15 C.F.R. 930.129(d). Information in compliance with the Department of Commerce regulations necessary to support Barnes' request for stay and remand was sought by the Secretary. Letter dated May 10, 2002, from Office of General Counsel Ocean Services, to Cynthia K. Frazzini, Assistant Attorney General and Steven D. Bell, Counsel for Appellant. The information submitted by Barnes did not, however, meet the requirements of the Department of Commerce regulations and on August 6, 2002, Barnes' request for stay and remand was denied and Barnes was directed to file its Initial Brief and supporting materials no later than September 4, 2002. Letter dated August 6, 2002, from the Assistant General Counsel for Ocean Services to Steven D. Bell, Counsel for Appellant and Cynthia K. Frazzini, Assistant Attorney General.

On September 4, 2002, Barnes, acting by and through its Counsel of Record, Steven D. Bell now of The Simon Law Firm, filed its Initial Brief and Supplementary Information. On October 4, 2002, the State of Ohio filed its Initial Brief. In its Initial Brief, Ohio urged the Secretary to dismiss Barnes' appeal asserting that Barnes had failed to provide briefs or supplementary information addressing the statutory criteria of the CZMA and was therefore subject to dismissal for good cause pursuant to 15 C.F.R. 930.129(a)(5). Ohio Initial Brief at 12. On October 23, 2003, the Secretary published a notice in the *Federal Register* (67 FR 65091), the Sandusky Register and the Lorain Morning Journal seeking public comment on the appeal and also requested the views of the relevant federal agencies. Letters dated December 12, 2002, to

¹ The Secretary of Commerce has delegated to the NOAA Administrator the authority to perform certain functions prescribed in the CZMA and implementing regulations at 15 C.F.R. Part 930, subpart II, and to make procedural rulings necessary for conducting appeals under CZMA section 307 and to undertake all staff work necessary to implement the regulations. Some of these functions have been redelegated to the NOAA General Counsel. See, Department of Commerce Organization Order 10-15, Section 3.01(u), and NOAA Administrative Order 201-104, Section 3.

USEPA, Corps, USFWS, United States Geological Survey and the National Marine Fisheries Service. Two federal agencies provided comments within areas of their expertise, the USFWS and USEPA. Letter dated December 21, 2002, from Terrence J. Miller, Acting Assistant Regional Director, USFWS, and letter dated January 28, 2003, from G. Tracy Meehan III, Assistant Administrator, USEPA Region 5.

On January 29, 2003, the parties were requested to file any final or reply briefs they desired to put in the administrative record within 30 days. Ohio requested an extension of time because it had not been served with a copy of a comment letter submitted by the Barnes family. *See*, fn 4 *infra*. Ohio was provided with the material submitted by the Barnes family by the NOAA Office of General Counsel for Ocean Services and the date for submission of any final or reply briefs was set for April 7, 2003. Ohio filed its Final Brief in a timely manner. Barnes failed to file any brief on or before April 7, 2003. When Steven D. Bell, Counsel of Record for Appellant, was contacted by the NOAA Office of General Counsel for Ocean Services, he provided no information or comment regarding Barnes' intent or reason for not filing any brief. Mary G. Holt, Memo to File, April 7, 2003.

Dismissal for Failure to Base the Appeal on the Standards in the Coastal Zone Management Act

The Coastal Zone Management Act provides that:

No license or permit shall be granted by the [federal agency until the state or its designated agency has concurred with the applicant's [consistency] certification or ... unless the Secretary [of Commerce], on his own initiative or upon appeal by the applicant, finds after providing a reasonable opportunity for detailed comments from the federal agency involved and from the state, that the activity is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security.
16 U.S.C. 1456(c)(30(A)).

The statute provides two grounds for the Secretary to override a state's objection in a CZMA consistency appeal: 1) the activity is consistent with the objectives of the CZMA; or 2) the activity is otherwise necessary in the interest of national security. The Secretary must conclude that one of those two statutory grounds are met in order to override a State's objection and decide in favor of an appellant.

The Secretary of Commerce has promulgated regulations interpreting these two statutory grounds set out by Congress in the CZMA. The regulations implementing the CZMA consistency appeal process provide that an activity is "consistent with the objectives or purposes of the Act" if it satisfies each of the following three requirements:

- (a) The activity furthers the national interest as articulated in section 302 or section 303 of the Act, in a significant or substantial manner;
- (b) The national interest furthered by the activity outweighs the activity's adverse coastal effects, when those effects are considered separately or cumulatively; and
- (c) There is no reasonable alternative available which would permit the activity to be conducted in a manner consistent with the enforceable policies of the management program. 15 C.F.R. 930.121.²

The Appellant must establish that its project meets one of the two statutory grounds in order to prevail in an appeal to the Secretary to override a State's consistency objection under the CZMA. The appellant bears the burden of submitting evidence in support of its appeal and the burden of persuasion. 15 C.F.R. 930.130(d).

Ohio requested Barnes' appeal be dismissed pursuant to 15 C.F.R. 930.129 which allows the Secretary to dismiss an appeal for good cause. Good cause is defined as, among other things, "[f]ailure of the appellant to base the appeal on grounds that the proposed activity is either consistent with the objectives or purposes of the Act or otherwise necessary in the interest of national security." 15 C.F.R. 930.129(a)(5). Ohio argues that Barnes based its appeal on an allegation that Ohio had no scientific basis for its objection to Barnes' consistency certification. Ohio Initial Brief, 14. Ohio further argues that Barnes' legal arguments and supplementary material are irrelevant because in "all prior consistency appeals, the Secretary 'has declined to review the substantive validity of the State objection in the appeal process.'" In the Consistency Appeal of Shickery Anton from an Objection by the South Carolina Coastal Council, 1991 NOAA Lexis 56 (May 21, 1991) at 9.

Ohio is correct. Notwithstanding the fact that both the statutory and regulatory criteria were fully set forth in the August 6, 2001, letter from NOAA's Office of General Counsel for Ocean Services to Appellant, nowhere in Barnes' Initial Brief does the Appellant address the statutory or regulatory criteria necessary to override the objection of a coastal State. Barnes' Initial Brief consists of eight pages of discussion which includes three pages of "Law and Argument." In its "Law and Argument" section, Barnes asserts the CZMA "does not impose a blanket restriction on the ability of property owners to conduct commercial activity," but instead "requires the balancing of a number of factors..." Barnes' Initial Brief, 5. Barnes then asserts that Ohio's consistency objection is "riddled with errors" and submits the opinion of its expert that Ohio's:

consistency objections are 'unfounded and that the project is consistent with [Ohio Coastal Management Plan] policies.' In his affidavit, Dr. Herdendorf ... uses real science and accurate facts to review the construction and environmental impact of the Project...In summary, Dr. Herdendorf's affidavit contains articulate, well-

² The Secretary has interpreted the statutory criterion of "necessary in the interest of national security" at 15 C.F.R. 930.122. Neither party nor any federal agency has addressed this criterion in the record of the Barnes Nursery, Inc., appeal.

reasoned and scientifically based refutation of ODNR's conclusions as to consistency. Barnes' Initial Brief, 7.

It is not necessary to weigh the value of Dr. Herdendorf's affidavit against any information submitted by Ohio because both Barnes' argument and Dr. Herdendorf's information are irrelevant to the criteria upon which this appeal must be decided. The Secretary of Commerce must base a federal consistency appeal decision on the criteria stated in the CZMA and does not review the factual basis for the State's consistency objection. The Secretary's decision in a federal consistency appeal is a de novo determination of whether the "activity is consistent with the objectives" of the CZMA or otherwise necessary in the interest of national security.³ Barnes never addressed the CZMA statutory criteria in its Initial Brief.⁴

Not only did Barnes fail to address the statutory and regulatory criteria required by the CZMA in its Initial Brief, Barnes failed to correct its error when given the opportunity to file a final or reply brief addressing the CZMA standards. Although Ohio brought attention to Barnes' error in its Initial Brief, Barnes failed to submit any brief on or before April 7, 2003, as allowed for in the final briefing schedule. Letter from NOAA Office of General Counsel for Ocean Services to Barnes, February 14, 2003. Upon telephone inquiry from the NOAA Office of General Counsel

³ While the Secretary may, as a threshold matter, determine whether a state's objection is based on a federally approved state policy which is enforceable under state law, the Secretary does not substitute his judgment for the State's in the implementation of its federally approved coastal management program.

⁴ Robert, Sharon and Jarret Barnes and Julie Barnes Foster did submit a co-signed letter to the Secretary on Barnes Nursery, Inc. letterhead during the public comment period asserting that the Barnes' project is in the national interest and attaching "supplemental information." Public Comment letter from Barnes Nursery, Inc., December 2, 2002. The Barnes family public comment and attached information was not a substitute for Barnes' Initial Brief. Even if the comments could be considered to be a brief filed by a party or persons acting on behalf of a party, it was submitted outside the schedule set by the Secretary and was not served on the State. The Federal consistency regulations provide for the filing of briefs and supplemental information within the context of the Secretary's briefing schedule and requires the service of briefs on all parties. 15 C.F.R. 930.127. The briefing schedule and service requirements ensure fairness and due process consideration for all parties. All parties receive notice of the time for filing briefs and have an equal opportunity to file briefs and supporting materials and to receive briefs and supporting materials.

In addition, the regulations requiring compliance with the briefing schedules ensure that the public has an opportunity to consider parties' briefs and supporting materials when responding to the Secretary's request for public comments. Likewise, interested federal agencies whose comments are sought by the Secretary have an opportunity to review briefs and supplementary information filed within the scheduled time. 15 C.F.R. 930.128(c).

⁵ The Appellant, the State, and any entity granted intervener status, are obligated to comply with the regulations governing federal consistency appeals and the briefing schedules and procedural rules of the Secretary found at 15 C.F.R. Part 930 Subpart H. Documents submitted by parties must comply with the Secretary's procedural regulations and instructions to the parties.

for Ocean Services to Steven D. Bell, Barnes' Counsel of Record, no explanation for the failure to file a brief or other response on behalf of Barnes was forthcoming, although Mr. Bell acknowledged the opportunity to file such a brief. Mary G. Holt, Memo to File, April 7, 2003. Thus, Barnes' failure to base its appeal on the CZMA criteria articulated in section 307(c)(3)(A) and the NOAA federal consistency regulations at 15 C.F.R. Part 930 Subpart H remains uncorrected. In addition, because the Appellant did not submit arguments and supplemental information based on CZMA section 307(c)(3)(A) and 15 C.F.R. 930.121, the Appellant also failed to carry its burden of proof and burden of persuasion as required by the NOAA regulations. 15 C.F.R. 930.130(d).

For the foregoing reasons, the CZMA Consistency Appeal of Barnes Nursery, Inc., is dismissed for good cause pursuant to 15 C.F.R. 930.129(a)(5). The Corps is precluded from issuing an after-the-fact permit to Barnes Nursery, Inc., for its irrigation or restoration activities.

Sincerely,

A handwritten signature in black ink, appearing to read "C. Lautenbacher Jr.", with a stylized flourish at the end.

Conrad C. Lautenbacher, Jr.
Vice Admiral, U.S. Navy (Ret.)
Under Secretary of Commerce
for Oceans and Atmosphere

cc: Robert W. Barnes
Barnes Nursery, Inc.